

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
February 16, 2012

In the Matter of SNT, Minor.

No. 305155
Kalamazoo Probate Court
Juvenile Division
LC No. 2010-000089-AY

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent appeals as of right the order of the trial court terminating his parental rights to his minor child pursuant to MCL 710.51(6). We affirm.

The child in this case was born in November 2003 to petitioner mother. Though respondent was not married to petitioner mother, he claimed paternity of the child in July 2004. The trial court awarded petitioner mother sole legal and physical custody of the child and awarded respondent reasonable visitation. Respondent was incarcerated in the county jail at that time and was later sentenced to approximately eight years in federal prison.

During the first approximately one year of the child's life, petitioner mother facilitated communication between the child and respondent, but thereafter stopped. For the following three to four years, respondent made little or no attempt to communicate with the child. Thereafter, respondent made sporadic attempts to contact the child by mail, and in October 2008, respondent moved that the trial court permit him telephone parenting time with the child. The trial court denied respondent's motion, stating that it was not reasonable to order a five-year-old child to have regular telephone contact with a person unknown to the child. The trial court further stated that the prior order of reasonable parenting time was still in effect and that it might become appropriate in the future to reintegrate respondent into the child's life.

In 2009, petitioner mother married. Shortly thereafter, respondent mailed to petitioner mother two certificates, one indicating that respondent had completed a substance abuse class and another indicating that respondent had completed a parenting class while in prison; the certificates were sent to petitioner mother with no accompanying correspondence. In July 2010, petitioner mother sent a letter to respondent asking him to voluntarily terminate his parental rights to the child to enable petitioner and her husband to adopt the child. In August 2010, respondent sent petitioner mother a denial of her request. In September 2010, petitioner mother and her husband petitioned the trial court for stepparent adoption of the child and termination of respondent's parental rights under the Adoption Code. At the conclusion of the trial on the

petition, the trial court found that petitioners had met the statutory burden and that termination of respondent's parental rights was warranted and in the best interests of the child.

Respondent contends on appeal that the trial court clearly erred in finding that he had failed to contact or communicate with the child and that termination was therefore not warranted under MCL 710.51(6). We disagree. This Court reviews for clear error the trial court's findings of fact regarding a petition to terminate under the Adoption Code. *In re ALZ*, 247 Mich App 264, 271; 636 NW2d 284 (2001). A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *Id.* at 271-272; *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997).

Respondent's parental rights were terminated pursuant to MCL 710.51(6), which provides in pertinent part:

(6) If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if the parent having legal custody of the child subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:

(a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.

(b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition. [MCL 710.51(6).]

Under this section, petitioners have the burden of proving by clear and convincing evidence that termination is warranted. *In re ALZ*, 247 Mich App at 272. To terminate parental rights under this section, the trial court must find that the requirements of both subsections (a) and (b) of section 51(6) are met. *Id.* Upon a finding that both subsections have been met, it is discretionary with the trial court whether to terminate the respondent's parental rights or whether termination would be contrary to the best interest of the child. *Id.* at 272-273.

In this case, respondent does not challenge the trial court's finding under subsection 51(6)(a), and the record supports the trial court's finding. Similarly, respondent does not challenge the trial court's ultimate finding that termination was in the best interest of the child, and we observe no basis for such a challenge. Rather, respondent argues that under subsection 51(6)(b), it cannot be said that he failed or neglected to visit, contact, or communicate with the child because it was petitioner mother's actions that prevented him from contacting or communicating with the child. In 2007 and early 2008, respondent attempted to contact the child sporadically by sending gifts of shoes and a Teddy bear, both of which petitioner mother returned. It was disputed before the trial court whether petitioner mother had also returned other

earlier correspondence, but petitioner mother agreed that she had opposed respondent having telephone contact with the child and had discouraged respondent's mother from contacting the child.

Respondent does not dispute that he had no contact with the child in the approximate two years leading up to the filing of the petition seeking termination. In fact, respondent concedes that he did not even attempt to contact the child directly during this two-year period. Instead, respondent argues that his lack of attempt to contact the child is the fault of petitioner mother because she had successfully discouraged him in the past. But, given that respondent had been awarded reasonable visitation by the trial court, respondent's failure to exercise that visitation simply because petitioner mother attempted to discourage him by previously returning some mailed items is an inadequate excuse. See, e.g., *In re SMNE*, 264 Mich App 49, 51; 689 NW2d 235 (2004) (a parent was not exempted from the provisions of subsection 51(6)(b) where she had the legal right to visit with the child but failed to do so because she believed that the other parent would impair the visits). In *SMNE*, this Court stated that where the noncustodial parent believed that the custodial parent was unjustly and improperly impairing the visits, the noncustodial parent should have sought the assistance of the Friend of the Court. *Id.*

The statutory language of subsection 51(6)(b) refers to a parent who has the ability to visit, contact, or communicate with the child. Respondent demonstrated that he had the ability to communicate by mail with his mother. In addition, respondent had mailed two certificates to petitioner mother as recently as 2009, and petitioner had not returned them. Given that respondent had the ability to mail items, he could have attempted to mail items to the child directly or could have sought assistance through the Friend of the Court if he believed that petitioner mother presented a barrier to communication. *In re SMNE*, 264 Mich App at 51. Given the clear and convincing record support for the trial court's determination, we hold that the trial court did not clearly err in terminating respondent's parental rights.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Amy Ronayne Krause